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**Wake Electric Membership Corp. and Local Union
553 of The International Brotherhood of Elec-
trical Workers, AFL-CIO, CLC.** Cases 11-CA-
18297 and 11-RC-6322

September 30, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On February 2, 2000, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions.¹

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions³

¹ The Respondent also filed a motion to reopen the record, to which the General Counsel filed an opposition. As discussed infra, we deny the motion on the ground that it is moot.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the last sentence of the fifth paragraph of the judge's decision to indicate that it was the Union, rather than the Respondent, that filed objections to the election.

³ In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by soliciting and promising to remedy grievances, we note that there is no evidence that the Respondent had an on-going practice of soliciting and remedying grievances prior to the advent of the union organizing effort.

We adopt the judge's finding, based on employee Smith's uncontradicted testimony, that the Respondent violated Sec. 8(a)(1) through General Foreman Pernell's statement to employee Peoples about employees Garrett and Holmes. Therefore, we find it unnecessary to consider the judge's rationale, stated in fn. 20 of his decision, for declining to draw an adverse inference from Peoples' failure to deny Smith's testimony.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by polling employees about whether the election petition should be withdrawn, Member Cowen finds that the poll was prompted by the Respondent's unlawful solicitation and promising to remedy grievances, as Operations Managers King and Price both told employees that, for the employees to benefit from the grievances that they had presented, the employees had to cause the Union to withdraw the petition, and Price recommended that the employees vote to ask the Union to do so. Accordingly, Member Cowen finds it unnecessary to rely on the judge's finding that the poll was unlawful because it violated the rules set forth in *Sruksnes Construction Co.*, 165 NLRB 1062 (1967).

In sec. III of his decision, the judge described certain events, including King's and Price's meetings with employees and crew leader Mishue's polling of employees about whether the petition should be withdrawn, as occurring in February 1999. The Respondent has ex-

cepted, pointing out that the record shows that these events took place in March 1999. We correct the judge's inadvertent error and find that these events occurred on the respective dates set forth by the judge but in the month of March 1999, rather than in February. This correction does not alter the violations found based on the conduct described in sec. III of the judge's decision.

only to the extent consistent with this Decision and Order.⁴

1. The judge found that Human Resources Administrator Faye Bridges was a supervisor and agent of the Respondent and that her statement to new employee Russell Smith concerning the Union constituted an unlawful promise of benefits to employees if the employees caused the Union to withdraw its election petition. We find it unnecessary to pass on the judge's finding that Bridges' statement to Smith violated Section 8(a)(1) of the Act, as this allegation is cumulative of other violations and, thus, does not affect the remedy.

We further find, however, that, contrary to the judge, Bridges was not shown to be a supervisor within the meaning of Section 2(11) of the Act.⁵ One of Bridges' prescribed job functions was to "[c]onduct recruitment program[s] for vacant positions including advertising, screening and initial interviewing to assure an adequate pool of qualified applicants [is] obtained for each position." The judge's principal basis in declaring Bridges to be a supervisor was his finding that, in performing the function of screening job applicants, Bridges effectively recommended hiring. James Mangum, the Respondent's general manager, testified that Bridges would select several applicants as the best of a group. For example, out of 10 applicants, she would select 3 as the best qualified. Bridges' screening would then go to a department head, who would do the actual hiring. Mangum testified that Bridges' recommendations were generally followed. The judge found that Mangum admitted that Bridges made a judgment call as to the best applicants in a group. The judge also noted that there was no evidence that the department heads hired any applicants other than ones recommended by Bridges. The judge found that, "[a]lthough Bridges recommended several candidates instead of one from a group, this was her recommendation, and it was generally followed."

We find, contrary to the judge, that Bridges did not effectively recommend hiring when she merely narrowed

⁴ We will substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

⁵ There are no exceptions to the judge's finding that Bridges was an agent of the Respondent. In light of our disposition of this 8(a)(1) allegation, we find it unnecessary to pass on the judge's finding.

Because the complaint allegation concerning Bridges is cumulative of other violations found, Member Bartlett finds it unnecessary to pass on whether Bridges is a supervisor within the meaning of Sec. 2(11) of the Act.

the applicant pool by screening applicants and recommending several to the department head, who ultimately decided which, if any, of the applicants was hired. Thus, if, as in the example given by Mangum, Bridges recommended 3 applicants out of 10 as the best qualified for a single position, and the department head ultimately hired one of the three, two of the three applicants who Bridges recommended would, necessarily, not be hired for the position. Thus, Bridges does not actually make hiring recommendations; she simply ranks applicants according to their qualifications and tells the department head which are the most qualified. Such actions do not constitute effective recommendations for hire.⁶

Our finding Bridges not to be a supervisor is in accord with *Ohio State Legal Services Assn.*, 239 NLRB 594, 596 (1978). There the Board found that staff attorney Mullinax's interviewing and screening of job applicants and recommending a limited number of candidates to the employer's executive director, who then reviewed the candidates and made a selection, did not constitute effective power to recommend hiring. Similarly, in *The Door*, 297 NLRB 601, 602 (1990), the Board stated: "[A]lthough we agree with the hearing officer that [Laboratory Director] Hilfer reviewed applications and recommended that certain applicants not be interviewed, we do not find that the ability to screen resumes and to make such recommendations, even if followed, is sufficient to establish the authority to effectively recommend the hire of employees." Accordingly, we do not find Bridges to be a supervisor.⁷

2. We adopt the judge's finding that the Respondent, through its general manager, James Mangum, violated Section 8(a)(1) by telling employees, in a speech on March 29, 1999,⁸ 2 days before the election, that other

electrical cooperatives would not work with the Respondent if it became unionized. As the judge noted, Mangum's statement meant that, if the employees selected the Union, they would not be able to rely on help from other electrical cooperatives in case of storms or other emergencies. It is well settled that an employer's predictions of adverse consequences of unionization arising from sources outside the employer's control—including the future actions of other employers—violate Section 8(a)(1) if they lack an objective factual basis. E.g., *Tawas Industries*, 336 NLRB No. 24, slip op. at 4 (2001). Mangum provided no basis for his statement that other electrical cooperatives would not work with the Respondent if it became unionized. Accordingly, we adopt the judge's finding that Mangum's statement violated Section 8(a)(1).⁹

3. The General Counsel excepts to the judge's failure to include in his Conclusions of Law the finding that the Respondent, through General Manager Mangum, violated Section 8(a)(1) by telling employees that a vote for the Union was futile. The judge credited testimony by the General Counsel's witnesses that Mangum told employees they would not receive any benefits if there was a "high vote" for the Union. The judge found that this statement, in context, was the equivalent of telling employees that a vote for the Union was futile. Elsewhere in the judge's decision, however, the judge referred to this statement as a threat of loss of benefits if the Union won. In addition, the judge's Conclusions of Law, recommended Order and notice all refer to the statement as a threat of loss of benefits rather than as a statement that selecting the Union would be futile.

We find that the statement is best described as a threat of futility. Accordingly, we shall modify the Conclusions of Law, Order, and notice to substitute that description.

4. The judge found, based on uncontroverted testimony, that, on February 27, General Foreman Charles Pernell, while intoxicated, barged into the home of employee Jeffrey Garrett, grabbed Garrett by the shoulders, pushed him down on a bed, and said that he (Pernell) had been to a meeting, that Garrett and employee Duke Holmes were the heads of the union movement, and that Garrett had to stop it. Pernell further told Garrett and that Garrett, Holmes, and Pernell were going to be fired and that there was no way that the employees could win an election. Pernell then punched a hole in the sheetrock wall of Garrett's bedroom. The judge found that Pernell's statement to Garrett that he was going to be fired was a threat violative of Section 8(a)(1) and that Per-

⁶ The judge erroneously cited *JAMCO*, 294 NLRB 896, 900 (1989), for the proposition that hiring recommendations were made "effectively" when 75 percent of them were followed. In that case, foreman Bell's recommendations to hire employees were followed about 75 percent of the time, but he was not found to have effectively recommended the hiring of employees. Bell was found to be a supervisor on the basis of other factors, including his independent adjustment of grievances regarding time keeping and his disciplining of employees for tardiness.

⁷ In finding Bridges to be a supervisor, the judge also mentioned that she participated in the evaluation of employees and conducted exit interviews. We find these factors unpersuasive. Bridges' conduct of exit interviews does not establish supervisory status. As the judge noted, conducting an exit interview is not synonymous with making a decision to terminate an employee. The judge's speculation that an exit interview would include an explanation of the reason for the termination would not alter this fact. Further, the judge's finding that Bridges participated in employee evaluations lacks support in the record, as the judge inferred this "participation" solely from Bridges' stated job function of "administer[ing] performance appraisal system." That Bridges "administered" a performance appraisal system does not establish that she performed employee evaluations herself.

⁸ All dates herein are in 1999 unless otherwise indicated.

⁹ In adopting this violation, Member Cowen does not rely on the judge's taking judicial notice of a particular storm that occurred shortly prior to the hearing in this case.

nell's statement that he had been to a meeting and that Garrett and Holmes were the leaders of the union campaign created an impression of surveillance of union activities in violation of Section 8(a)(1). We agree. See *Royal Manor Convalescent Hospital*, 322 NLRB 354, 362 (1996), *enfd.* 141 F.3d 1178 (9th Cir. Feb 26, 1998) ("The Board has long held that, when, in comments to its employees, an employer specifically names other employees as having started a union movement or as being among the union leaders, the employer unlawfully creates the impression, in the minds of its employees, that he has been engaging in surveillance of his employees' union activities."); *Athens Disposal Co.*, 315 NLRB 87, 92, 98 (1994) (Supervisor Uicab's statement to employee Salas that he thought that Salas was one of the leaders of the union was "the type of comment . . . which . . . create[s] the impression, in the mind of an employee, that his employer has been engaged in surveillance of its employees' union organizing activities").¹⁰

The amended complaint also alleged that, on February 27, the Respondent, through Pernell, violated Section 8(a)(1) by assaulting an employee because he engaged in union activities. The judge failed to find explicitly that Pernell's assault on Garrett violated Section 8(a)(1), even though he later mentioned the assault in a summary of the Respondent's violations. We therefore grant the General Counsel's exception and correct the judge's inadvertent failure to include this assault as a violation in his conclusions of law and recommended Order.

¹⁰ Member Bartlett agrees with former Chairman Hurtgen's dissent in *United States Coachworks, Inc.*, 334 NLRB No. 118 slip op. at 6 (2001), that an employer's statement to an employee acknowledging his protected activity does not create the impression of surveillance in the absence of any finding that the employer was unlikely to have learned of the employee's protected activity by lawful means. However, in the absence of a three-Member Board majority to overrule Board precedent, Member Bartlett joins in adopting the judge's finding, for the reasons stated above, that Pernell's comments created the impression of surveillance.

Contrary to his colleagues, Member Cowen would not adopt the judge's finding that Pernell's statement to Garrett created the impression that the Respondent had engaged in surveillance of union activities. Member Cowen notes that, while Pernell's statement shows knowledge of Garrett's and Holmes' union activities, it does not indicate the source of that knowledge, which could as easily have been through the "grapevine" or some other means as by surveillance. Thus, in Member Cowen's view, without more than is shown on the record here, the impression of surveillance allegation must be dismissed for failure of proof.

Member Liebman notes that, contrary to Member Cowen's view, Pernell's statement was coercive even though it did not indicate the source of his information about Garrett's and Holmes's union activities. "The Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means." *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998), quoting *United Charter Service*, 306 NLRB 150, 151 (1992).

5. The judge found that the Respondent, on March 24, violated Section 8(a)(3) and (1) of the Act by accelerating the resignation dates of employees Scott Abbott, Anthony Brogden, Keith Browning, and Vaden Kearney and granting each of them a severance package, because of their union and other protected, concerted activities, and to deter their voting in the March 31 Board election. We agree with the judge that the Respondent's action was unlawful.

Abbott, Brogden, and Browning, who the Respondent knew to be union supporters, and Kearney, who had worked for the Respondent for only 5 weeks, submitted their resignations during the week of March 24. The four employees anticipated that they would be required to work for 2 weeks after giving notice of resignation, which was the Respondent's normal practice. Instead, the Respondent, departing from its normal practice, offered to pay the employees 2 weeks' severance pay and release them from any further work requirements. The employees accepted this offer.

The judge found the Respondent's actions unlawful, citing the principle that "a grant or promise of benefits during the critical pre-election period will be considered unlawful unless the employer comes forward with an explanation, other than the pending election, for the timing of such action."¹¹ The judge found that the Respondent did not provide a believable explanation, other than the pending election, for offering to pay the employees severance pay and release them from any obligation to work for 2 more weeks. The Respondent contended that safety was its main concern in offering the severance pay, because previously one of its employees, distracted by his mother's upcoming surgery, had been killed in an accident. Thus, the Respondent purportedly believed that personal problems or concerns away from the job created a dangerous situation for employees engaged in hazardous work. Additionally, the Respondent asserted that its concern about safety was heightened in early March by a report it had received of a fatality at Pee Dee Electric Cooperative.

In discrediting the Respondent's asserted reason for offering severance pay to employees Abbott, Brogden, Browning, and Kearney, the judge noted that the Respondent had required another employee, apprentice lineman Greg Risuti, who had resigned less than 3 months before Abbott, Brogden, Browning, and Kearney did, to work his 2-week notice period, even though he had made strong complaints against the Respondent in his letter of resignation and the Respondent admitted that Risuti was not very happy toward the end of his tenure.

¹¹ *Honolulu Sporting Goods Co.*, 239 NLRB 1277, 1280 (1979).

Additionally, the judge found that the cause of the fatality at Pee Dee Electric was simply the wearing of old protective gloves and that the minutes of the Respondent's March 15 safety meeting did not support the Respondent's contention that the Pee Dee Electric fatality was discussed at that meeting. Accordingly, the judge found that the Respondent's asserted reason for offering severance pay and accelerating the departure of employees Abbott, Brogden, Browning, and Kearney was pre-textual.

We agree with the judge that the Respondent's offering severance pay in lieu of additional work to the four resigning employees was clearly a new benefit, as the Respondent's standard practice previously had been not to offer severance pay to employees who gave notice of resignation or to relieve them from working during the customary 2-week notice period. We further agree with the judge that the Respondent failed to show that it had a reason, other than the pending election, for granting the four employees this new benefit. Accordingly, we adopt the judge's finding that the Respondent's grant of this benefit violated Section 8(a)(1). Moreover, as the Respondent's offer to pay the four employees for 2 weeks' work while relieving them from any obligation to perform work was made only about a week before the election, it was clearly aimed at eliminating the employees, three of whom were known union supporters, from the bargaining unit prior to the election and deterring them from voting. The Respondent's action thus interfered with the employees' Section 7 rights, and violated Section 8(a)(1), on this basis as well. We therefore find it unnecessary to pass on the judge's finding that the Respondent's conduct also violated Section 8(a)(3).

6. The judge found that the Respondent's unfair labor practices were of a nature that precluded the possibility of a fair rerun election. Therefore, he recommended issuance of a remedial bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). We disagree. Contrary to the judge and our dissenting colleague, we conclude that, under all the circumstances, a *Gissel* bargaining order is not warranted in this case.

The judge's unfair labor practice findings that we adopt involve soliciting and promising to remedy grievances, promising benefits if employees ceased their support for the Union, polling employees to determine whether they would ask the Union to withdraw its election petition, telling employees that their union activities would damage their relationships with other electric co-operatives and cause the latter to discontinue helping employees during emergencies, telling employees that it would be futile to select the Union, threatening employees with unspecified reprisals, threatening employees

with discharge, creating an impression of surveillance of union activities, and accelerating the resignation dates of four employees and granting them severance pay. Thus, the Respondent's violations do not include discharge or other adverse actions against union supporters, the closing of a plant, or threat of plant closure, which are the more typical "hallmark" violations found in cases warranting *Gissel* bargaining orders.¹²

To justify the bargaining order, the judge and our dissenting colleague rely in part on the "hallmark" violation of a grant of significant benefits to employees. In so doing, the judge relied on the Board's decision in *America's Best Quality Coatings Corp.*, NLRB 470 (1993). In that case, however, the employer "utilized a classic 'carrot and stick' approach, first denying the employees expected wage reviews and paid vacations before the election, and then granting such benefits after the election." *Id.* at 472. By contrast, in the present case, the benefits granted to employees, offering severance pay to employees who resigned and not requiring them to work for an additional 2 weeks, were neither expected nor initially denied. Further, unlike the typical case, these benefits were not designed to "remedy the very grievances which gave rise to the union interest,"¹³ and thereby undercut the unionization effort. Indeed, the benefits that the Respondent granted were rather peripheral to employees' terms and conditions of employment, as they were applicable only when employees resigned their employment. Moreover, in *America's Best Quality Coatings*, the *Gissel* bargaining order was justified by the discharge of 3 leading union adherents and the layoff of 21 other employees. No comparable violations are present here.

In granting the bargaining order, the judge also relied on the Respondent's solicitation of grievances and promise to remedy them. He found that these actions by the Respondent were similar to the employer conduct in *Astro Printing Services*, 300 NLRB 1028 (1990), and *Tele-dyne Dental Products Corp.*, 210 NLRB 435 (1974), where *Gissel* bargaining orders were issued, and that the rationale of those cases justified a bargaining order here. In those cases, the employers not only solicited employees' grievances, they also agreed to specific demands of the employees. In the present case, however, while the Respondent solicited grievances and impliedly promised

¹² "Hallmark" violations are unfair labor practices that the Board finds especially significant in evaluating the long-term effects of employer misconduct on employee free choice. See *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212 (2d Cir. 1980); *Garvey Marine, Inc.*, 328 NLRB 991, 994 (1999); *General Fabricators Corp.*, 328 NLRB 1114 fn. 7 (1999).

¹³ *NLRB v. Jamaica Towing, Inc.*, above, 632 F.2d 208 at 213.

to remedy them, it did not promise, orally or in writing, any specific benefit improvements.

In *Astro Printing*, after soliciting a list of grievances from the employees, the employer signed and gave to the employees a document promising specific and wide-ranging benefits, including a 6 percent raise on March 1; annual cost-of-living increases; merit increases pursuant to an annual review; increased health and sick leave benefits, vacation, paid holidays, paid personal days; payment of accumulated vacation pay on termination; and 30 days' notice prior to any future changes in policies. On receiving this document, the employees requested the union to cancel the election petition. In *Teledyne*, the plant manager obtained a list of the employees' specific wishes, including a pay increase, told them that it would have to be approved by headquarters, and later returned and told them that the list had been approved. The employees thereafter told the union that they had gotten what they wanted and they did not want the union any more. Thus, the employers' actions in *Astro Printing* and *Teledyne* undermined the unionization efforts in those cases in a direct and specific way, while the Respondent's implicit promise here to remedy grievances in this case was amorphous and unspecified. Accordingly, we find the judge's reliance on those cases to be misplaced.¹⁴

Our dissenting colleague also cites as a hallmark violation the Respondent's threatening employees with discharge. Three such threats were made, all by Supervisor Pernell. The threats were made in statements to individual employees, not in a speech to a large group. Moreover, one of the statements, which contained the most direct threat, was made outside of work hours and at a time when Pernell was visibly inebriated. Under these circumstances, we do not find that these threats, even coupled with the other violations that the Respondent committed, have such a lasting inhibitive effect on a substantial portion of the work force that they would preclude the possibility of a fair rerun election. Indeed, the threats were of such limited impact that the judge did not rely on them as hallmark violations in justifying his bargaining order.

Based on the foregoing, we cannot conclude that in this case "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Gissel*, 395 U.S. at 614-615. We shall

therefore use the Board's traditional remedies for the Respondent's unfair labor practices.¹⁵ We leave the question concerning the Union's representation of the Respondent's unit employees to be resolved by the preferred method of a second Board election.

Having decided that a *Gissel* bargaining order was necessary, the judge did not rule on the Union's objections to the election in Case 11-RC-6322. The Union's objections parallel certain unfair labor practice allegations with respect to events occurring during the critical preelection period. With respect to those allegations, we have affirmed the judge's findings that the Respondent violated Section 8(a)(1) by soliciting and promising to remedy grievances if the employees would cause the Union to withdraw a petition for a Board election and would otherwise cease their support for the Union and by polling employees to determine whether they would cause the Union to withdraw its petition for a Board election. Conduct violative of Section 8(a)(1) is a fortiori conduct which interferes with employee free choice in an election. See *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). We therefore sustain the Union's objections to this misconduct, and we shall set aside the election on that basis.

ORDER

The National Labor Relations Board orders that the Respondent, Wake Electric Membership Corp., Wake Forest, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting and promising to remedy grievances if the employees would cause the Union to withdraw a petition for a Board election and would otherwise cease their support for the Union.

(b) Promising employees benefits if they ceased their support for the Union.

(c) Polling its employees to determine whether they would cause the Union to withdraw its petition for a Board election.

¹⁴ Cf. *Aqua Cool*, 332 NLRB No. 7 (2000) (*Gissel* bargaining order not warranted where, among other violations, employer unlawfully solicited grievances and promised to remedy them).

¹⁵ Consistent with our finding that a *Gissel* bargaining order is not warranted here, we reverse the judge's findings that the Respondent violated Sec. 8(a)(5) by failing and refusing on February 18 to recognize and bargain collectively with the Union as the representative of the unit employees and by unilaterally changing its policy concerning acceleration of resignation dates and granting severance pay on March 24, "because at that time the Respondent was not obligated to bargain with the Union." *Fiber Glass Systems*, 278 NLRB 1255, 1256 (1986). See also *Beverly California Corp.*, 326 NLRB 232 fn. 17 (1998). Additionally, in view of our rejection of the bargaining order remedy, we dismiss as moot the Respondent's motion to reopen the record to adduce evidence concerning an alleged change in composition of its work force.

(d) Telling employees that their union activities would damage their relationship with other electric cooperatives and cause the latter to discontinue helping employees during emergency situations.

(e) Threatening the employees with unspecified reprisals if the Union won the election.

(f) Threatening employees with discharge because of their union activities.

(g) Accelerating the resignation dates of employees and granting them severance packages in order to deter them from voting in a Board election and because of their union activities.

(h) Creating an impression of surveillance of union activities.

(i) Telling employees that it would be futile to select the Union as their collective-bargaining representative.

(j) Assaulting employees because they engage in union activities.

(k) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action intended to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Wake Forest, Zebulon, Oxford, Louisburg, and Youngsville, North Carolina, copies of the attached notice marked "Appendix A."¹⁶ Copies of the notice on forms provided by the Regional Director for Region 11, after being signed by Respondent's authorized representative, shall be posted by Respondent at its facilities located at Wake Forest, Zebulon, Oxford, Louisburg, and Youngsville, North Carolina, immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 16, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

testing to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the proceeding in Case 11-RC-6322 be severed and remanded to the Regional Director for Region 11 for further action consistent with this decision.

Dated, Washington, D.C. September 30, 2002

William B. Cowen, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Unlike my colleagues, I agree with the judge that the nature and extent of the Respondent's unfair labor practices warrant the imposition of an affirmative bargaining order. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Those unfair labor practices included three separate threats to discharge employees for engaging in union activities, as well as granting significant benefits to employees shortly before the election. Such actions are considered "hallmark" violations of Section 8(a)(1), which will normally support the issuance of a bargaining order. See, e.g., *Garvey Marine, Inc.*, 328 NLRB 991, 994 (1999), *enfd.* 245 F.3d 819 (D.C. Cir. 2001); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), *enfd.* 44 F.3d 516 (7th Cir. 1995), *cert. denied* 515 U.S. 1158 (1995); *NLRB v. Jamaica Towing*, 632 F.2d 208, 212-213 (2d Cir. 1980).

And these were not the only violations of the Act. Far from it: they were accompanied by a drumbeat of other unlawful actions, some of which were committed by high management officials and were directed at nearly all employees. Those included soliciting and promising to remedy grievances, promising benefits if the employees rejected the Union, polling employees to determine whether they would cause the Union to withdraw its representation petition, telling employees that it would be futile to select the Union, threatening employees with unspecified reprisals and with the loss of assistance from other electric cooperatives if they supported the Union, creating the impression that employees' union activities were under surveillance, and accelerating the resignation dates of four employees to keep them from voting in the election. In uttering one of the discharge threats, supervisor Pernell even assaulted employee Garrett in Garrett's own home, and punched a hole in the wall of

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Garrett's bedroom.¹ Nor did the unlawful conduct end with the election: Pernell threatened employees with discharge even after the election, thus demonstrating a likelihood that the Respondent would continue to violate the Act in the future in order to keep the Union out. See *Garvey Marine*, 328 NLRB at 995; *America's Best Quality Coatings Corp.*, 313 NLRB at 472.

In these circumstances, and for the reasons discussed by the judge, I find it unlikely that the effects of the Respondent's unlawful conduct can be erased by the use of traditional remedies and that a fair rerun election could be held. *Gissel*, supra, 395 U.S. at 614–615. Accordingly, I would adopt the judge's recommended bargaining order. I would also affirm his finding that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union and by making unilateral changes in the unit employees' terms and conditions of employment. I therefore respectfully dissent.

Dated, Washington, D.C. September 30, 2002

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT solicit and promise to remedy grievances if our employees cause, Local Union 553 of the International Brotherhood of Electrical Workers, AFL-CIO,

¹ I am not at all persuaded by the majority's contention that this conduct was somehow less serious, or its coercive effects less long lasting, because it took place outside of working hours when Pernell was apparently drunk.

CLC, the Union, to withdraw a petition for a Board election and otherwise cease supporting the Union.

WE WILL NOT promise our employees benefits if they cease their support of the Union.

WE WILL NOT poll our employees to determine whether they will cause the Union to withdraw a petition for a Board election.

WE WILL NOT tell our employees that their union activities will damage their relationships with other electric cooperatives and cause the latter to discontinue helping employees during emergency situations.

WE WILL NOT threaten our employees with unspecified reprisals if the Union wins an election.

WE WILL NOT threaten our employees with discharge because of their union activities.

WE WILL NOT accelerate the resignation dates of our employees and grant them severance packages in order to deter them from voting in a Board election and because of their union activities.

WE WILL NOT create an impression of surveillance of our employees' union activities.

WE WILL NOT tell our employees that it would be futile to select the Union as their collective-bargaining representative.

WE WILL NOT assault our employees because they engage in union activities.

WE WILL NOT in any other manner interfere with, coerce, or restrain our employees in the exercise of their rights under Section 7 of the Act.

WAKE ELECTRIC MEMBERSHIP CORP.

Jane North, Esq., for the General Counsel.

W. Britton Smith, Jr., Esq. and *Aaron M. Christensen, Esq.* (*Smith and Christensen*), for the Respondent.

S. Eugene Ruff, International Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge in Case 11–CA–18297 was filed on March 23,¹ 1999 by International Brotherhood of Electrical Workers, AFL–CIO–CLC (the Union), and an amended charge on May 28, 1999. Complaint issued on July 30, 1999, and alleges that Wake Electric Membership Corp. (Respondent, or the Company) solicited and promised to remedy grievances in order to discourage union activities, promised its employees that it would remedy grievances if they ceased their support for the Union, promised its employees benefits if they ceased their support for the Union, polled its employees concerning their support for the Union, advised its employees that their activities on behalf of the

¹ All dates are in 1999 unless otherwise stated.

Union damaged their working relationships with other non-union electric cooperatives, advised its employees that they would lose the help of other electric cooperatives during emergency situations if they engaged in activities on behalf of the Union, threatened its employees with loss of benefits if they engaged in activities on behalf of the Union, made threats of unspecified reprisals if employees voted for the Union, advised its employees that it would be futile to select the Union as their collective-bargaining representative, and threatened its employees with termination because of their activities on behalf of the Union,—all in violation of section 8(a)(1) of the Act.

The complaint also alleges that Respondent accelerated the resignation dates of Scott Abbott, Anthony E. Brogden, Keith Browning, and Vaden Kearney because they joined or assisted the Union, and engaged in other concerted activities—in violation of Section 8(a)(3) and (l) of the Act.

Finally, the complaint allege that Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain collectively with the Union, and by unilaterally changing its policy concerning acceleration of resignation dates and the granting of severance pay.

The complaint further alleges that the foregoing unfair labor practices are so serious that the possibility of erasing their effects by conducting a fair election is slight, and that the expression of the employees' sentiments in the authorization cards should be protected by issuance of a bargaining order.

Pursuant to a Stipulated Election Agreement approved on March 3, a secret ballot election was held on March 31 in a unit which the pleadings establish as appropriate for the purposes of collective bargaining.² The tally of ballots showed 8 votes for the Union, 18 against it, and 4 challenged ballots. Respondent filed timely objections to the election, and an order consolidating cases and directing a hearing issued on July 30.³

A hearing on these matters was conducted before me in Wake Forest, North Carolina, on September 27, 28, and 29, 1999. Thereafter, the General Counsel and Respondent filed briefs. Based upon all the evidence of record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a North Carolina corporation with a principal place of business located at Wake Forest, North Carolina, and additional facilities located at Zebulon, Oxford, Louisburg, and Youngsville, North Carolina, where it is engaged in distribution and retail sale of electric power and energy to members/consumers. During the 12 months preceding issuance of the com-

plaint, Respondent purchased and received at its Wake Forest, North Carolina place of business, goods and materials valued in excess of \$50,000 directly from points outside the State of North Carolina, and derived revenues in excess of \$250,000. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE EMPLOYEE SIGNING OF AUTHORIZATION CARDS; THE UNION'S DEMAND FOR RECOGNITION

A meeting of certain of Respondent's employees was held on February 13 in a motel, and was conducted by S. Eugene Ruff, an International representative. He distributed union authorization cards, which provided that the signatory authorized the local union of IBEW to represent him in collective bargaining with his employer. Ruff repeated the language set forth on the cards and their purpose—to enable the Union to bargain with the employer. He stated that it was the Union's policy to attempt to get authorization cards signed by 65 percent of the employees. The International Representative told the employees that, after the Union had obtained authorization cards from a majority of the employees, it would ask the employer to recognize it as the employees' bargaining representative. Some employees asked what would happen if the Company did not recognize the Union. Ruff replied that, in such event, the Union would be forced to file a petition with the Board.

Prior to the election, employees signed 13 authorization cards on February 13, one on February 15, 3 on February 16, and one on February 17, a total of 18 employees.⁴ The cards stated that the signatory authorized the Union to represent him in collective bargaining, and made no reference to a Board election. I conclude that International Representative Ruff's statement to employees, that he would be forced to file a petition for an election if Respondent failed to recognize the Union, did not affect the validity of the cards. *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 584 (1969) (card is to be counted unless employee was told that it would be used *solely* for the purpose of obtaining an election); *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), *enfd.* 351 F.2d 917 (6th Cir. 1965); *DTR Industries*, 311 NLRB 833, 838 (1993).

There were 32 employees in the unit on February 18, and 31 on February 19 and for the next 4 payroll periods.⁵ I conclude that a majority of the employees in the appropriate unit had signed valid authorization cards by February 17.

The Union sent Respondent a letter dated February 18 in which it asserted that it represented a majority of the employees in the unit, and that it was prepared to prove this. In the letter, the Union requested a meeting for the purpose of establishing its claim and scheduling negotiations for a collective-bargaining agreement.⁶ By letter dated February 24, Respondent declined, on the asserted grounds that it was not convinced that the Union represented an uncoerced majority in the unit.⁷ This

² All full-time construction and maintenance employees including Apprentice Linemen, Journeymen Linemen, Meter Readers, the Lead Meter Reader, Crew Leaders, Servicemen, Warehousemen, part-time Warehousemen, the Garage Coordinator, and Right-of-Way technicians, employed by Respondent at its Wake Forest, Zebulon, Oxford, Louisburg, and Youngsville, North Carolina facilities, but excluding Member Services Department employees, Engineering Department employees, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

³ GC Exh. 1(g).

⁴ GC Exhs. 3, 4, 8, 9, 11, 13–20.

⁵ Jt. Exh. 1. The parties agreed to the exclusion of certain employees whose names on the exhibit have been lined out.

⁶ GC Exh. 23.

⁷ GC Exh. 24.

letter also asserts that the Company had received a faxed copy of a petition by the Union to the Board dated February 18.

III. THE COMPANY'S SOLICITATION OF EMPLOYEE CONCERNS

A. Summary of the Evidence

Operations Manager Don King testified that an employee told him about the authorization card signing. The Company executives held numerous conferences about this, and hired a consulting firm. General manager James Mangum and Operations Manager Phillip Price testified that identifying employee concerns was a major objective.

King further testified that employee Eddie Peoples told him that some employees had questions about the Union, and asked whether a meeting with the employees could be arranged. Peoples corroborated this testimony. King then held a meeting of employees on February 16 in the operations center. Two supervisors accompanied him. According to employee Jeffery Garrett, King asked whether any employees had grievances against the Company, and, if so, they should be stated. In response, the employees stated concerns about the number of contractors compared to employees, wage rates, insurance, and sick leave. The meeting lasted until 2:30 P.M., during which time the Company purchased a pizza lunch for the employees. According to Garrett, King said that he would take these matters to "management", and that he was confident that the Company would "work with" the employees on the grievances. Employee Duke Holmes and former employee Anthony Brogden corroborated this testimony. King testified that he wrote down the employees' comments, but told employees that he could not make any promises.

King held another meeting the following morning, February 17. Employee Garrett testified that King informed employees that he had spent 3 hours with "management," its consultants and attorneys, and that he was confident that the Company would "work with" the men, but that its hands were tied because of the "Union vote." If the employees would give the Company 6 months to "work out their grievances," after 6 months the employees could vote on the Union if the Company did not satisfy employee concerns. Former employee Anthony Brogden and employee Duke Holmes corroborated this testimony.

King gave contradictory testimony on this subject. On cross-examination, he testified that, in response to an employee question, he answered that the only way employees could receive benefits "sooner" was for them to cause the Union to withdraw the petition. On redirect examination, he denied that he "promised" anything if the employees would withdraw the petition—an employee asked how the petition could be withdrawn, and King said he did not know, but told them that they would have to "initiate" the request to the Union to withdraw the petition. "It was their call." On re-cross-examination, King denied that he had previously testified that the only way employees could get benefits "sooner" was to have the petition withdrawn.

King held another meeting of employees on the afternoon of February 17. Employee Garrett testified that King asked the employees to give the Company "another chance." If so, King was confident that the Company would "work it out." The only way that employees could receive benefits earlier was to cause

the Union to withdraw the petition. King's testimony does not indicate that two meetings were held on February 17.

Operations Manager Phil Price held a meeting of employees in the conference room on the morning of February 19. Employee Russell Smith testified that Price said that he had been asked whether the employees could benefit from the grievances they had presented. The only way this could be done, Price stated, was to have the employees vote to ask the Union to withdraw the petition; he recommended that the Union do so. Former employee Anthony Brogden affirmed that Price said the employees could hold a "polling or vote" to see whether "we could put it off for 6 months." This testimony was corroborated by employee Duke Holmes.

Price agreed that he spoke to the employees in response to a prior employee question about speeding up the process. He also agreed that crew leader Larry Mishue asked him whether the employees could meet for awhile and that he consented. Mishue contended that there was a brief meeting of employees on whether the election should be postponed. Price was not in the room at the beginning of the meeting. I conclude that Mishue separately asked Price whether there could be an employee meeting, and that Price consented.

Mishue testified that there was then a brief 15-minute meeting of employees in which he spoke in favor of voting to give the Company another 6 months. He then asserted that nobody knew how he voted. He was concerned that other members of the unit (meter readers) were not present, and asked Price whether they could be brought over to the conference room. Price agreed, and caused the meter readers' supervisor to send them from a distance of several miles, using Company vehicles. According to Russell Smith, Mishue said, "We could vote on this now." Price then stated, "Well, let's get some pads. I'll get you all some pads and you all do what you've got to do and I am going to leave the room." Price brought in some pads, according to Smith.

Mishue then conducted a poll by having the employees write on a piece of paper their decision on whether to postpone the election. Mishue asked Duke Holmes to assist him. "I guess since I was not for the union," Mishue testified, "I wanted someone that was for the Union so it would be on an equal basis." Holmes called out the votes on the slips of paper, and Mishue recorded them. The result was 14 votes for postponing the Board election, and 11 opposed to the postponement. These events took place during working time. Mishue reported the results to Price, and, the next day, reported the events to the union representative. The petition was not withdrawn.

B. Factual and Legal Conclusions

I credit Garrett's corroborated testimony that Don King at the first meeting solicited employees to state their grievances, and, after receiving them, told the employees that he was confident that the Company would "work with" them on these matters. Garrett was a believable witness—his status as a current employee of Respondent enhances his credibility under current Board law, as does his position as a crew chief. Duke Holmes was also a current employee and was equally believable, while Anthony Brogden, as a former employee was an impartial witness. Although King contended that he did not make any

promises, he did not explicitly deny the testimony of the General Counsel's witnesses.

I credit the testimony of the General Counsel's witnesses that, on February 17, King told the employees that, after consulting with the Company's managers, he was confident that the Company could "work it out," that the employees should give the Company another chance, that the Company's hands were tied because of the "Union vote," and that the only way the employees could get benefits earlier was to cause the Union to withdraw the petition. If the Company did not satisfy the employees' concerns within 6 months, the employees could have a Board election at that time. Although King may have said that he was not making any "promises," this was mere verbiage, in light of his request that the employees give the Company "another chance," and his averment that the Company would "work with" the employees. King's contradictory testimony on whether he told employees that they could receive earlier benefits by causing the Union to withdraw the petition inspires little confidence in him as a witness. On similar facts the Board has concluded that an employer's solicitation of grievances contained an implicit promise to correct them, violative of Section 8(a)(1), despite asserted denials of promises. *Kinney Drugs*, 314 NLRB 296, 298-299 (1994); *Noah's New York Bagels*, 324 NLRB 266 (1997). The Board has found that the employer violated the Act when it "presented the employees with a choice between their union support and a quick, favorable resolution of their grievances . . ." *Carpenters Health & Welfare Fund*, 327 NLRB 262, 263 (1998). I make the same conclusion herein.

It is clear from Price's admission that he spoke to employees on February 19. I credit the testimony of the General Counsel's witnesses that Price told them that the only way they could resolve the grievances they had presented was to ask the Union to withdraw the petition. He told the employees that they could hold a "polling or vote" on whether to do so. When Mishue said that the vote should take place immediately, Price provided notepads on which the votes could be recorded, and caused other members of the bargaining unit to be brought to the meeting with company vehicles. These events took place during working time on company property.

Price then left the room, and Mishue conducted the polling. This sequence of events, which Price had started and which Mishue was continuing, could reasonably have been interpreted by employees as meaning that Price and Mishue were acting in concert, and that Mishue was acting on Price's behalf. Price's leaving the room while the vote was being conducted could only have meant that he was leaving Mishue in charge of events which he wished to take place. Mishue thus had apparent authority to conduct the poll. I conclude that Mishue was an agent of Respondent for this purpose. *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996); *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997).

I do not credit Mishue's testimony that the employees did not know how he voted, as this contradicts his prior testimony that he told employees they should vote to give the Company another 6 months. Mishue was an observer for the Company during the election.

The polling which took place was thus conducted by a company agent whose opinion that the election should be postponed was known to employees. The Board has stated that employer polling of employees will be violative of Section 8(a)(1) unless the purpose of the poll is to determine the truth of the Union's claim of majority status, this purpose is communicated to employees, assurances against reprisal are given, the employees are polled by secret ballot, and the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. *Struksnes Construction Co.*, 165 NLRB 1062 (1967). The purpose of the polling in this case was not to determine the truth of the Union's claim of majority status—the Company rejected the Union's offer to prove this. The purpose was to postpone the Board election. No assurances against reprisal were given. The polling described above can scarcely be characterized as one conducted by secret ballot, and the Board has rejected an employer's reliance on a poll because of failure to meet this requirement. *Lou's Produce*, 308 NLRB 1194, 1195 fn. 6 (1992). Finally, contrary to the *Struksnes* rules, Respondent engaged in the unlawful solicitation of grievances from employees. I conclude that Respondent violated Section 8(a)(1) by conducting this poll.

IV ALLEGED THREAT OF TERMINATION BY BRENDA HARRISON

A. Summary of the Evidence

The complaint alleges that Brenda Harrison was a billing supervisor, and that she was a supervisor and an agent of the Company. It further alleges that she threatened an employee with termination because of his union activities. The answer denies these allegations.

Duke Holmes testified that he entered Respondent's office in late February to check on a worker's compensation claim. On the way out, he stopped to talk with Brenda Harrison, whom he understood to be "some kind of supervisor" dealing with "collections or something to that order." Harrison's office was a small eight by ten office in the collections department. There was no one else in the office. Holmes testified that Harrison told him that there had been a meeting of the department heads that morning to discuss the union movement, that they knew who was responsible, and that they were going to be fired. Harrison added that she was speaking to Holmes "as a friend," and that she hoped he knew what he was doing, because he was going to be fired. Harrison did not testify.

Respondent's documents show that Harrison was a secretary in the engineering and operations department in 1995.⁸ By 1996 she was the Company's "Customer Accounting Supervisor," and a customer was informed of this fact.⁹ A review of her functions in this position shows that she makes sure that billing is done on time, collections received, and payments made. She "works closely" with the billing supervisor.¹⁰ Harrison also performs statistical and scheduling functions.¹¹

⁸ GC Exh. 25, p. 7.

⁹ Id. at 5.

¹⁰ Id. at 2.

¹¹ Id. at 4.

B. Factual and Legal Conclusions

It is obvious that Harrison's statement to Holmes would be unlawful if it may be attributed to Respondent. Counsel for the General Counsel concedes that "there is no record evidence that Harrison actually possesses or exercises any of the statutory indicia of supervisory status."¹² She nonetheless argues that "Respondent cloaked Harrison with apparent authority by designating her a supervisor and by holding her out to employees as a supervisor, as evidenced by the memorandum announcing her appointment, and by identifying her to the public as one of Wake's supervisors."¹³

The Board has stated: "It is well settled that possession of the title of supervisor does not in itself confer supervisory status under the Act (authority cited)." *Hallandale Rehabilitation Center*, 313 NLRB 835, 836 (1994). In *Jordan Marsh Stores Corp.*, 317 NLRB 460 (1995), the employee in question had the title "stock supervisor." She was hourly paid at a rate 50 percent higher than other stock associates. She made work assignments and schedules, and selected employees for overtime work. She wrote up records of personnel interviews that would go into the employee's personnel file "like a little bit of a warning." She attended regular meetings of department supervisors. Nonetheless, the Board agreed with the judge's conclusion that this employee did not exercise any authority that was more than routine, and that there was no evidence that she possessed any of the statutory indicia of supervisory status (id. p. 467).

In the case at bar, the evidence shows that Harrison performed administrative and financial services. It does not show any regular interaction with employees concerning their duties and responsibilities. The fact that the public was informed that Harrison's work included handling complaints from customers does not evidence supervisory authority over employees. I conclude that Harrison was not a supervisor, and I shall recommend that this allegation be dismissed.

V. ALLEGED PROMISE BY HUMAN RESOURCES ADMINISTRATOR FAYE BRIDGES TO REMEDY EMPLOYEE GRIEVANCES IF THEY WOULD CEASE SUPPORTING THE UNION

A. Summary of the Evidence

The complaint alleges and the answer denies that Human Resources Administrator Faye Bridges was a supervisor and an agent of Respondent, and that she promised employees that Respondent would remedy grievances if the employees ceased their support for the Union.

Former employee Russell Smith was hired by Respondent in late February. In early March, Operations Manager Price introduced him to Faye Bridges, who had some documents to give him pertaining to insurance. Russell met with her in the office of Right-of-Way Supervisor Ed Wheeler. At the conclusion of these matters, Bridges told Russell that everybody was confused about the Union, but that she was certain that the Company would prevail, and the employees needed to give it one more chance to work out its differences with the employees. Specifically, the employees needed to vote against the Union to give the

Company a chance to correct its mistakes. Bridges did not testify. Russell's testimony is uncontradicted and is credited.

The remaining issue is whether Bridges' statement may be attributed to Respondent. Evidence of Bridges' status may be found in Company documents, and the testimony of General Manager Mangum. The record includes a performance appraisal of Bridges by the Chief Financial Officer. The document is relevant, not for the rating Bridges received ("excellent"), but for the list of functions which she performed. These were as follows:

1. Conducts recruitment program for vacant positions including advertising, screening and initial interviewing to assure an adequate pool of qualified applicants are obtained for each position.
2. Administers Performance Appraisal system.
3. Performs new employee orientation program, including information of benefit programs, and conducts exit interviews as needed.
4. Assists Department Managers in arranging training programs, for both their Department and each employee, in order to assure a well trained work force in accordance with the Strategic Plan.
5. Develops and maintains, in concert with Department Managers and Supervisors, position specific documents including position descriptions and job specifications to conform with changing responsibilities and legal requirements (i.e. ADA).
6. Administers alcohol and drug testing program, in concert with the Director of Safety, to assure compliance with current DOT regulations and Wake EMC policy.
7. Administers the fringe benefit program including all enrollments, separations and changes.
8. Establishes and maintains an employee communication program in order for employees to understand the programs available to them.¹⁴

General Manager Mangum testified about the "screening" process described above. Bridges would select several applicants as the best of a group, e.g., out of 10 applicants she would select 3 as the best qualified. The screening would then go to a department head, who would do the actual hiring. Mangum testified that Bridges' recommendations were followed "generally," but did not know the times when they were not followed. Mangum gave equivocal testimony on whether a "screening" constituted a "recommendation." He affirmed that Bridges was stating her opinion as to the three best candidates of the group of applicants, and that she made a "judgment call," but contended that there was a difference between a "screening" and a "recommendation." The difference was not explained. If an applicant was rejected, Bridges sent notice of this fact to him.¹⁵

B. Factual and Legal Conclusions

Section 2(11) of the Act defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign ,

¹² GC.Br., p. 23.

¹³ Ibid.

¹⁴ GC Exh. 29.

¹⁵ GC Exhs. 27, 28.

reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” It is well established that the presence of any one of these “indicia” is sufficient to prove supervisory status. *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948), cert. denied 335 U.S. 908 (1949).

I find that Bridges’ screening of job applicants constituted a recommendation. This is the only conclusion which can be reached from Mangum’s admission that Bridges made a judgment call as to the best applicants out of a group. There is no evidence that the department heads hired any applicants other than the ones selected by Bridges as the best, and Mangum agreed that the department heads generally followed Bridges’ recommendations. The Board has held that hiring recommendations were made “effectively” when 75 percent were followed. *JAMCO*, 294 NLRB 896, 900 (1989). Although Bridges recommended several candidates instead of one from a group, this was her recommendation, and it was generally followed.

Bridges’ list of functions included administration of the performance appraisal system. This necessarily means that Bridges evaluated employees or administered the process of their evaluation by others. The Board has relied on one employee’s evaluation of another as a factor to be considered in determining whether the former was a supervisor. *Lab Glass Corp.*, 296 NLRB 348, 351 (1989); *Impact Industries*, 285 NLRB 5, 11 (1987).

Bridges’ list of functions also shows that she conducted “exit interviews.” Although conducting an exit interview is not synonymous with making a decision to terminate an employee, it usually includes an explanation of the reason for the decision. Bridges signed the Company’s response to a notice of a claim for employee benefits from the state unemployment insurance division. The printed form lists various explanations for the termination, including discharge due to inability to perform the work.¹⁶

I conclude that Bridges effectively recommended the hiring of applicants and thus performed one of the functions of a supervisor. This conclusion is buttressed by her participation in the evaluation of employees, and her conduct of exit interviews. Accordingly, she was a supervisor within the meaning of Section 2(11) of the Act, and an agent of the Company.

Respondent argues that the statements made by Bridges did not constitute a promise that the Company would remedy grievances if the employees ceased supporting the Union—as alleged in the complaint.¹⁷ As indicated, Bridges said that that the employees needed to give the Company one more chance so that they could work out the problems that they had created, and that the employees should vote against the Union to give the Company a chance to correct its mistakes. The credited evidence shows that Operations Manager Don King told employees that the only way they could get earlier benefits was to cause the Union to withdraw its petition. This statement was made prior to

Smith’s conversation with Bridges. King’s meaning was implicit in Bridges’ statements to Russell. Accordingly, I conclude that those statements constituted a promise of earlier benefits if the employees would comply. I therefore find that what Bridges said to Russell was violative of Section 8(a)(1) for the reasons set forth in Section III of this Decision.

VI. ALLEGED ASSAULT, THREATS, IMPRESSION OF SURVEILLANCE, SOLICITATION OF GRIEVANCES BY CHARLES PERNELL

A. Summary of the Evidence

The complaint as amended alleges that General Foreman Charles Pernell, an admitted supervisor, assaulted an employee because he engaged in union activities, solicited and promised to remedy grievances in order to discourage union activities, threatened employees with termination because of their union activities, and created an impression of surveillance of union activities.

Pernell and Jeffery Garrett were neighbors, and had socialized and exchanged favors. On February 27, the Garretts were at home during the evening with their two children and two guests. Pernell pulled up to the house, and Mrs. Garrett came to the door. “I’m here to see your fucking husband,” Pernell said to her. He walked past her into the house. Garrett’s 10-year old son approached him. “Not now,” Pernell said, picked up the boy and threw him on the hearth near the fireplace. The boy started crying, and one of the guests comforted him. Garrett was in the bathroom adjoining the bedroom, and Pernell and Mrs. Garrett raced towards it. Pernell entered the bathroom. He grabbed Garrett by the shoulders, pulled him towards the bed, and told Mrs. Garrett to get out. The latter said she was going to call the police, but Garrett advised against it. Pernell pushed Garrett down on the bed, and said that he had been to a meeting, and that Garrett and Duke Holmes were the head of the union movement. “You’ve got to stop it,” he said.¹⁸ Mrs. Garrett was standing in the foyer next to the bedroom door. According to the credible testimony of both Garrett and his wife, Pernell said that Garrett, Duke Holmes, and Pernell himself were going to be fired, and that there was no way the employees could win an election. Pernell clenched his fist and punched a hole in the sheetrock wall of the bedroom. Pernell then said he was sorry, and that he was going home. Garrett replied that Pernell had been drinking, and had no business driving. Garrett then drove Pernell home.

General Manager Mangum testified that, in early March, he heard from Operations Manager Price that Pernell had gone to Garrett’s home and had engaged in an “argument.” Mangum assumed that it was about the Union. Although Pernell’s conduct violated the “do’s and don’ts” given to the Company by its consulting firm, Mangum took no action against Pernell at that time because it was just a “rumor.” In June, Pernell was promoted from general foreman to line superintendent. Mangum testified that, several days prior to his issuance of a memo to employees on September 2, he learned from Respondent’s counsel that Mrs. Garrett intended to hold the Company accountable for Pernell’s conduct. In his September

¹⁶ GC Exh. 26. Bridges checked the box entitled “No work available.”

¹⁷ R. Br. p. 4.

¹⁸ General Counsel’s motion to strike the word “her” in line 22, p. 26, and insert in lieu thereof the word “it”, is granted.

ber 2 memo to employees, Mangum stated that the Company had “a problem with a supervisor going to an employee’s home regarding Union activities.” The supervisor was identified as Pernell¹⁹ Mangum then suspended Pernell for a week without pay.

Russell Smith was hired just past mid-February. In March about a week before the election, while he was still in probationary status, Smith was sitting in the supervisor’s office in the Youngsville plant talking to other employees about the Union. Pernell came around the corner, and said, “You might ought to think about your new hire. You’re still under probation and we don’t really need a reason to get rid of you.”

Pernell was asked on direct examination whether he ever had a conversation about union activity with Russell Smith. He replied affirmatively, and asserted that he apologized to Smith for hiring him while a union campaign was going on, because it was not “fair.” This answer, of course, does not relate to Smith’s testimony.

Smith also testified about a conversation which he heard in the parking lot after the election, between Pernell and employee Eddie Peoples. Although he did not see them, he recognized their voices. Peoples said that Garrett and Holmes were taking the union loss “pretty bad.” Pernell replied that Garrett and Holmes should “watch themselves,” and that he would “hate to see them fired over bullshit like that.” Pernell denied making any such statements. Peoples was called as a witness for Respondent, but was not asked any questions about his conversation with Pernell related by Smith.

B. Factual and Legal Conclusions

Pernell’s statement to Garrett on February 27 that he was going to be fired because of his union activities was a threat which was violative of Section 8(a)(1). His statement that he had been to a meeting, and that Garrett and Holmes were the leaders of the union campaign created an unlawful impression of surveillance of union activities, also violative of Section 8(a)(1).

I credit Russell Smith’s testimony that, about a week before the election when the employees were discussing the Union, Pernell said that they had better think about their new hire. This was clearly a reference to Smith, who was then on probation. Pernell’s further statement that Smith was on probation and that the Company did not really need any reason to get rid of him was a scarcely veiled unlawful threat of discharge.

I also credit Smith’s uncontradicted testimony that, after the election, he heard Eddie Peoples tell Pernell that Garrett and Holmes were taking the Union’s defeat “pretty bad.” Pernell replied that Garrett and Holmes should “watch themselves,” and that he would hate to see them fired over “bullshit like that.” This again was a threat of discharge which was unlawful. It was coercive irrespective of Pernell’s intent and the fact that it was overheard by Smith. *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997).²⁰

¹⁹ GC Exh. 48.

²⁰ The General Counsel argues that I should make an adverse inference based on the fact that Peoples did not deny Smith’s testimony. The Board has accepted the “missing witness” rule in *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1977). Under that rule,

VII. ALLEGED UNLAWFUL STATEMENTS BY GENERAL MANAGER MANGUM

A. Summary of the Evidence

The complaint alleges that General Manager Mangum told employees that their union activities damaged their working relationships with other nonunion cooperatives, that they would lose the help of those cooperatives during emergency situations, and that they would lose benefits if they continued their union activities. Mangum also allegedly made threats of unspecified reprisals if employees voted for the Union, and said that it would be futile for the employees to elect the Union as their bargaining representative.

Mangum made a speech to most of the members of the bargaining unit on March 29, 2 days before the election. The General Counsel’s witnesses testified that he said the employees would not see any benefits if there was a high vote for the Union, and that the fight had just begun,²¹ that the other cooperatives would not help Wake employees in times of emergency,²² and that the other cooperatives would not permit their employees to train with Wake employees.²³ Mangum also told employees that their vote could be used “for or against them.”²⁴

General manager Mangum testified that he communicated regularly with other electric cooperatives in the state. Sometime in March, he prepared a draft of a memo to all employees on the subject of Wake Electric’s relationships with other electric cooperatives. It reads in part:

A number of employees have asked if the debate we are having about union representation will affect our relationships with other North Carolina electric cooperatives. . . .

In the past, we have benefited from our association with the other electric cooperatives in North Carolina. We have worked together to create training programs for linemen and other employees. We have been asked to assist in storm restoration efforts at other cooperatives and we have asked for their assistance when we needed help. I expect that we will continue to find these relationships extremely valuable.

If the past is an accurate guide, there will probably be electric cooperatives in North Carolina that will reduce or suspend their association with Wake Electric as a way to

“where relevant evidence would properly be part of a case is within the control of the party whose interest it would be to produce it, and he fails to do so without satisfactory explanation, the (trier of fact) may draw an inference that such evidence would have been unfavorable to him.” 29 Am. Jur. 2d Sec. 178 (cited in *Martin Luther King, supra*). In this case, Peoples was not missing—he was not questioned concerning the matter about which Smith had testified. General Counsel could not properly cross-examine him concerning a matter about which he had not testified. I make no adverse ruling, and rely on Smith’s believable testimony.

²¹ Jeffery Garrett.

²² Jeffery Garrett, Russell Smith, Duke Holmes, and Larry Missue gave similar testimony, but said that Mangum’s statements were made after the election. This is contrary to the other evidence, is unlikely, and I do not credit it.

²³ Garrett, Holmes.

²⁴ Garrett, Holmes.

limit the contact between our employees and theirs. The extent of this potential problem is difficult to determine because this is their choice and not ours.²⁵

Mangum testified on cross-examination that, at the time this draft was written, no other electric cooperative had expressed any concern to him about the results of the union campaign. On March 28, he prepared a document entitled "Talking Points." It states that he had been asked to report the vote count at a statewide meeting, that every general manager in the state would be there, and that this was very important to them. "These working relationships have been very valuable for both Wake Electric and for our employees. In my opinion, Wake Electric's future relationship with the other electric cooperatives in the state may depend on the number of YES and NO votes If the Union were to win this election, as far as I'm concerned, the battle has just started."²⁶

Mangum denied the statements attributed to him at the March 29 meeting. He asserted that he spoke from notes, concerning the first paragraph of which he made "comments," but that he read the second paragraph to the employees verbatim because it was "very important that (he) not say too much about this particular issue." The second paragraph reads as follows:

The other electric cooperatives' reaction to our vote is an issue that we do not have a lot of control over. It is well known, however, that all the other electric cooperatives in the state are union free. Whether or not they would choose to reduce or suspend their association or working relationship with us over our union activity is unclear. The extent of this potential problem is difficult to determine because this is their choice and not ours. Their reaction, however, may be affected by the actual number of YES and NO votes.²⁷

On cross-examination of Russell Smith, Respondent quoted the foregoing paragraph from Mangum's notes, and asked whether Smith remembered it. He replied that the notes were a "watered down version," and that there was "a lot left out." Asked to identify what was left out, Smith replied that he could distinguish "what's fiction and what's fact." When Mangum was speaking about other cooperatives, he stated that they would not want to work with Wake Electric if it became unionized.

B. Factual and Legal Conclusions

There is no evidence that the two documents Mangum prepared prior to his speech on March 29—the memo to employees and the "Talking Points"—were ever distributed to employees. However, the language in them has similarities to the statements attributed to Mangum by the General Counsel's witnesses at the March 29 meeting. The memo asserts benefits from association with other electric cooperatives in the areas of employee training and storm restoration efforts. It adds that the associations will probably reduce this cooperation as a method of limiting contact between their employees and those of Wake Electric. The same prediction is stated as a possibility in the "Talking Points."

As Russell Smith put it, Mangum's statements in the asserted "verbatim" portion of his speech were a "watered down" version of what he actually said. Even the asserted text notes that "all the other electric cooperatives in the state are union free." The cumulative evidence from the General Counsel's witnesses has more probative weight than Mangum's careful tiptoeing between unlawful and merely arguable statements. Russell Smith gave a blunt characterization of the asserted verbatim text—it was "fiction," not "fact"—and Mangum told his employees that the other cooperatives would not work with Wake Electric if it became unionized. I so find. This meant that, in case of storms and other emergencies, Wake Electric employees could not rely on help from other electric cooperatives. This would create onerous working conditions. I take judicial notice of the fact that, only a short time prior to the opening of the hearing in this case, and only a few miles from the site of the hearing, North Carolina suffered a devastating storm and flooding. I conclude that Mangum's statement violated Section 8(a)(1).

I also credit the consistent and mutually corroborative testimony of the General Counsel's witnesses as to the other statements made by Mangum. This evidence shows that Mangum told employees that they would not receive any benefits if there was a "high vote" for the Union, and that the fight had just begun. In *HarperCollins Publishers*, 317 NLRB 168 (1995), enf'd. 79 F.3d 1324 (1996), the Board found with judicial approval that an employer's statement that it intended to fight with every weapon at its disposal conveyed to employees the threat that it would use any means, including unlawful conduct, in order to defeat the Union. In agreeing with the Board, the court relied upon the fact that the employer had made other unlawful threats.

In this case, Respondent created an impression of surveillance of union activities, committed an assault upon a union sympathizer, and threatened its employees with termination because of those activities (Pernell). It threatened them with loss of cooperation from other electric companies and consequent onerous working conditions. It unlawfully solicited grievances from its employees, conducted an unlawful poll on whether the Union should discontinue its election efforts, and promised employees earlier resolution of their grievances if they would cause the Union to withdraw its petition for an election. As I find hereinafter, it unlawfully accelerated the resignation dates of four employees. I conclude that these actions, when combined with Mangum's statement that a vote in favor of the Union would result in loss of benefits, and that the fight would continue, conveyed to employees the impression that Respondent's unlawful conduct would continue if the Union won.

The complaint also alleges that Mangum made threats of unspecified reprisals if the Union won. The credited evidence shows that Mangum said that the employees' vote could be used for or against them. I conclude that this conveyed to employees the message that a vote for the Union could be injurious to them in some unspecified way, and therefore constituted a threat of unspecified reprisals. Considered in the context of Mangum's statement that the employees would lose benefits if the Union won, this was equivalent to telling the employees that a vote for the Union was futile. In the "Talking Points," Mangum wrote that if the Union won the election, the battle

²⁵ GC Exh. 45.

²⁶ GC Exh. 56.

²⁷ R. Exh. 2.

had just started. Based on the similarity of Mangum's written statements to those attributed to him by Garrett, and the latter's trustworthiness as a witness, I credit Garrett's testimony that, in his speech to the employees, Mangum said that there would not be any benefits if there was a "high vote" for the Union, and that the fight had just begun.

In *Reno Hilton*, 319 NLRB 1154 (1995), the employer wrote a memo to employees saying in part that the union would not benefit the employees, could hurt them seriously, and might jeopardize their jobs (id. p. 1155). These statements were made in a context of other coercive conduct by the employer. The Board evaluated this evidence as follows:

The coercive effect of Hughes' memo is apparent when it is read against the backdrop of those unfair labor practices, which give both specificity and force to Hughes' otherwise vague assertions that the Union would not benefit employees, and might jeopardize their jobs. We therefore find that Respondent violated the Act in this respect (id. p. 1155).

Although the unlawful conduct committed by the employer in *Reno Hilton* is not precisely similar to that by Respondent herein, the coercive effect is equivalent. Mangum's statement that the employees would not obtain any benefits if the Union won is the same as telling them that a union victory would be futile. This was emphasized by Mangum's statement that, in such event, the fight would just begin. I conclude that Mangum's statements—that the employees would not receive any benefits if the Union won, that the fight would just begin, and that the employees' vote could be used for or against them—were violative of Section 8(a)(1).

VIII. THE ALLEGED ACCELERATION OF RESIGNATION DATES

A. Summary of the Evidence

The complaint alleges that, on or about March 24, Respondent violated Section 8(a)(3) by accelerating the resignation dates of four employees and by offering them a severance package, because of their union activities.

Anthony Brogden, Scott Abbott, Keith Browning, and Vaden Kearney submitted resignations during the week of March 24. Kearney had been employed for 5 weeks. Respondent's customary practice was to require resigning employees to work for two weeks after notice of resignation. Immediately after the tendered resignations, Respondent offered the employees 2 weeks of severance pay, and released them from any further work requirements. The employees accepted. This was the first time that Respondent had offered severance pay to an employee. General Manager Mangum testified that he knew that Brogden, Abbott, and Browning were union supporters. During the Board election on March 31, the ballots of Abbott and Browning were challenged.

Mangum testified that the primary concern in offering the severance pay was "one of safety." The Company had experienced a fatality in the past. An employee had been concerned about his mother's forthcoming surgery, and died under circumstances not fully indicated in the record. The Company concluded that "distraction" was the primary cause of the accident, according to Mangum. More recently, there had been a fatality early in 1999 at another company, Pee Dee Electric

Cooperative. There was a safety meeting at Wake Electric at which the accident at Pee Dee Electric was the primary topic. Mangum asserted that this accident "reinforced" the Company's earlier belief that personal problems, or concerns away from the job, created a dangerous situation when an employee was engaged in hazardous work.

The record contains a letter from Pee Dee Electric to Mangum, dated March 1, which reports a fatality involving a line-man who was wearing old rubber gloves.²⁸ Also in evidence is a record of a safety meeting held at Wake Electric on March 15. Safety meetings were held every 2 weeks. There is no reference to the Pee Dee fatality in the record of the March 15 safety meeting at Wake Electric.²⁹

Mangum agreed that other employees had resigned in the past, one of whom was Greg Risuti. In Risuti's letter of resignation, he made strong complaints against the Company,³⁰ and Company manager Mangum agreed that Risuti was not very happy toward the end of his tenure. Nonetheless, he was allowed to work a 2-week notice period. There is no evidence that he was offered a severance package.

B. Factual and Legal Conclusions

As indicated, the complaint alleges that Respondent violated Section 8(a)(3) of the Act by accelerating the resignation dates of Scott Abbott, Anthony Brogden, Keith Browning, and Vaden Kearney, and by offering them a severance package. There is no doubt about the facts. The employees tendered their resignations, anticipating that they would be required to work the customary 2-week notice period. Instead, the employer offered them 2-weeks of severance pay, and excused them from further work. The employees accepted.

The Board has stated its position on this issue as follows:

The validity of wage increases or other benefits during the pendency of representation petitions turns upon whether they are granted "for the purpose of inducing employees to vote against the union" (authority cited). And a lawful purpose is not established by the fact that the employer who took such action did not expressly relate the granted wage increase to the organizational campaign. For, as the Supreme Court observed in *N.L.R.B. v. Exchange Parts Company*, supra the absence of conditions or threats pertaining to the particular benefits conferred is not "of controlling significance." Under settled Board policy, a grant or promise of benefits during the critical pre-election period will be considered unlawful unless the employer comes forward with an explanation, other than the pending election, for the timing of such action. [*Honolulu Sporting Goods Co., LTD.*, 239 NLRB 1277, 1280 (1979).]

Respondent's unfair labor practices establish that it had animus against the Union movement. It knew that Brogden, Abbott, and Browning were union supporters. The acceleration of the resignations took place only a few days before a Board election. During the election, the ballots of Abbott and Brown-

²⁸ GC Exh. 52.

²⁹ R. Exh. 4.

³⁰ GC Exh. 51.

ing were challenged.³¹ I make the obvious inference that they were challenged by the Company.

On the basis of Respondent's animus against the Union, its knowledge that Brogden, Abbott, and Browning were union supporters, its challenges to the ballots of Abbot and Browning after accelerating their resignations a few days before the election, and the fact that the severance packages given to these employees were the first offered by Respondent to any employee, I conclude that the General Counsel has established a prima facie case sufficient to support an inference that the union activities of Brogden, Abbott, and Browning, and Respondent's interest in eliminating pro-Union votes in the forthcoming election, were motivating factors in these actions.³²

Respondent's asserted reason for the accelerated terminations is implausible. Although Mangum claimed that the accident at Pee Dee Electric Company reinforced its belief that "distraction" was a cause of accidents, and was discussed at the next safety meeting, there was no such discussion. The letter from Pee Dee shows that the cause of the fatality was failure to wear adequate protective gloves. Although another employee at Wake Electric, Greg Risuti, wrote a critical letter to the Company resigning his employment, and was not happy about his job according to Mangum, this was apparently insufficient evidence of "distraction" to warrant a severance package and accelerated resignation. I conclude that Respondent's asserted reason for the accelerated resignations and the severance packages is pretextual. Accordingly, I find that those actions violated Section 8(a)(3) and (1) of the Act.

IX. THE ALLEGED REFUSAL TO BARGAIN AND UNILATERAL CHANGE IN POLICY OF ACCELERATING RESIGNATIONS AND GRANTING SEVERANCE PAY

A. *The Refusal to Bargain*

The complaint alleges that beginning on February 18, Respondent refused to bargain with the Union as the representative of the employees in the appropriate unit. The parties agreed upon the accuracy of the unit alleged as appropriate.³³ I have found that the Union had obtained authorization cards from a majority of the employees in the bargaining unit by February 17. Respondent has presented no argument to support its position that the Union did not represent a majority of employees in the unit on that date.³⁴ On February 18, the Union

³¹ There were four challenged ballots, but the record does not indicate the identities of the other two.

³² *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

³³ *Supra*, fn. 2.

³⁴ Larry Mishue and Eddie Peoples, both signatories of authorization cards, testified that they subsequently changed their minds. There is no evidence that they attempted to withdraw their cards, nor any evidence that Respondent relied upon their change of opinion. Nor is there any evidence that Respondent knew the total number of cards upon which the Union relied—indeed, Respondent declined to see the proof. The Union had 18 signed cards at the close of February 17. There were 31 employees in the bargaining unit on February 19 and thereafter. Accordingly, the Union had two more cards than the number necessary to establish majority status. In addition to Respondent's complete silence

demanding recognition and bargaining, and the Company refused. Accordingly, I find that Respondent on that date violated Section 8(a)(5) and (1) of the Act.

B. *The Unilateral Change in Policy on Accelerating Resignation Dates and Granting Severance Pay*

The complaint alleges that, in addition to violating Section 8(a)(3) by accelerating resignation dates and granting severance pay, Respondent unilaterally changed its policy on such matters in violation of Section 8(a)(5). Respondent's action took place on or about March 24, after the Union had obtained majority status and had demanded recognition and bargaining. Respondent's action transgressed Section 8(a)(5) as alleged.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Respondent Wake Electric Membership Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Union 553 of the International Brotherhood of Electrical Workers, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent violated Section 8(a)(1) of the Act.

(a) Soliciting and promising to remedy grievances if the employees would cause the Union to withdraw a petition for a Board election and would otherwise cease their support for the Union.

(b) Promising its employees benefits if they ceased their support for the Union.

(c) Polling its employees to determine whether they would cause the Union to withdraw its petition for a Board election.

(d) Telling employees that their union activities would damage their relationships with other electric cooperatives and cause the latter to discontinue helping employees during emergency situations.

(e) Threatening employees with loss of benefits and unspecified reprisals if the Union won the election.

(f) Threatening employees with discharge because of their Union activities.

(g) Creating an impression of surveillance of union activities.

4. By accelerating the resignation dates of Scott Abbott, Anthony Brogden, Keith Browning, and Vaden Kearney on March 24 and granting each of them a severance package, because of their union and other protected, concerted activities, and in order to deter their voting in a forthcoming Board election, Respondent violated Section 8(a)(3) and (1) of the Act.

5. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time construction and maintenance employees including Apprentice Linemen, Meter Readers, the Lead Meter Reader, Crew Leaders, Servicemen, Warehousemen, part-time Warehousemen, the Garage Coordinator, and Right-of-Way Technicians, employed by Respondent at its Wake For-

on this issue, it may be observed that it is not entitled to rely on events which took place during an unlawful campaign against the Union. *St. John Trucking*, 303 NLRB 723 fn. 4 (1991).

est, Zebulon, Oxford, Louisburg, and Youngsville, North Carolina facilities, but excluding Member Services Department employees, Engineering Department employees, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

6. Since on or about February 17, 1999, by signing union authorization cards, a majority of the employees in the unit designated and selected the Union as their representative for the purposes of collective bargaining with Respondent.

7. At all times since February 17, 1999, and continuing to date, the above-described Union has been the representative for the purpose of collective bargaining of the employees in the unit described above in paragraph 5, and by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

8. Commencing on or about February 18, 1999, and continuing to date, the Union has requested, and is requesting, Respondent to recognize and bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive representative of all employees of Respondent in the unit above described in paragraph 5.

9. Commencing on or about February 18, 1999, and at all times thereafter, Respondent refused, and continued to refuse, to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of all employees in the unit described above in paragraph 5, thereby violating Section 8(a)(5), in that

(a) Beginning on or about February 18, 1999, Respondent failed and refused to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of all employees in the unit described above in paragraph 5; and,

(b) On or about March 24, and continuing thereafter, Respondent unilaterally, without notice to or consultation with the Union, changed its policy concerning accelerating the resignation dates of employees and the granting of severance pay.

10. The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

11. Respondent has not violated the Act except as herein stated.

THE REMEDY

The principal issue is whether issuance of a bargaining order would be appropriate. Respondent's conduct falls into several categories. The first is one of persuasion. The Company solicited grievances and impliedly promised to satisfy them if the employees would cause the Union to withdraw its election petition. In a prior case involving similar facts, the Board summarized the employer's conduct as follows:

It is clear that after receiving the Union's demand for recognition and bargaining, the Respondent immediately took action designed to identify the employees who supported the Union,

to solicit the grievances underlying their desire for representation, and to impress on the employees that their demands could best be fulfilled through direct dealing with the Respondent and that union representation would not afford them any advantages. Although the Respondent did not commit any "hallmark" violations (such as threats of plant closure, threats of discharge, or actual discriminatory discharge), the unfair labor practices were serious in nature, commenced on the day the Union demanded recognition, involved the Respondent's co-owners, and affected the entire small bargaining unit.

This case is similar to *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974). The Board there found that the respondent reacted to a union's request for recognition by unlawfully soliciting grievances, promising to grant benefits based on a list of solicited employee demands, and subsequently granting one minor benefit. In concluding that a bargaining order was necessary to remedy these unfair labor practices, the Board stated at 435-436:

Obviously such conduct must, of necessity, have a strong coercive effect on the employees' freedom of choice, serving as it does to eliminate, by unlawful means and tactics, the very reason for a union's existence. We can conceive of no more pernicious conduct than that which is calculated to undermine the Union and dissipate its majority while refusing to bargain (citation omitted). Neither is there any conduct which could constitute a greater impairment of employees' basic Section 7 rights under our Act, especially since such conduct by its very nature has a long-lasting, if not permanent, effect on the employees' freedom of choice in selecting or rejecting a bargaining representative. [Cited in *Astro Printing Services*, 300 NLRB 1028, 1029 (1990).]

The Board in *Astro Printing* concluded that the possibility of erasing the effect of the Respondent's unfair labor practices and of conducting a fair election by the use of traditional remedies was slight, and issued a bargaining order. Respondent's "persuasive" tactics in the case at bar are strikingly similar to those in *Teledyne Dental* and *Astro Printing*. The rationale of those cases is sufficient to justify issuance of a bargaining order based on Respondent's "persuasive" tactics alone.

Respondent's tactics were not limited to persuasion, however. Those tactics included threats of more onerous work in emergencies, loss of benefits, unspecified reprisals, continuation of the "fight" if the Union won, a threat of discharge, and a physical assault on one of the Union's principal supporters in his own home. They also included the "hallmark" violation of a grant of significant benefits to employees (*America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enf'd. 44 F.3d 516 (7th Cir. 1995), cert. denied 515 U.S. 1158 (1995)); they involved the Company's principal managers, and took place just before a Board election. I conclude that these actions were of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable second election cannot be had. *NLRB v. Gissel Packing Co.*, supra, 395 U.S. at 614; *NLRB v. CWI of Maryland, Inc.*, 127 F.3d 319 (4th Cir. 1997), enf'g. in relevant part 321 NLRB 698 (1996);

Complete Carrier Services, 325 NLRB 565 (1998). Accordingly, I shall recommend issuance of a bargaining order, in addition to a cease-and-desist order.

I further conclude that Respondent has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' statutory rights. *Hickmott Foods*, 242 NLRB 1357 (1979). Accordingly, I shall recommend issuance of a broad order.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended³⁵

ORDER

The Respondent, Wake Electric Membership Corp., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting and promising to remedy grievances if the employees would cause the Union to withdraw a petition for a Board election and would otherwise cease their support for the Union.

(b) Promising employees benefits if they ceased their support for the Union.

(c) Polling its employees to determine whether they would cause the Union to withdraw its petition for a Board election.

(d) Telling employees that their union activities would damage their relationship with other electric cooperatives and cause the latter to discontinue helping employees during emergency situations.

(e) Threatening the employees with unspecified reprisals and loss of benefits if the Union won the election.

(f) Threatening employees with discharge because of their union activities.

(g) Accelerating the resignation dates of employees and granting them severance packages in order to deter them from voting in a Board election and because of their union activities.

(h) Refusing to bargain collectively with the Union and unilaterally changing its policy on accelerating resignation dates and granting severance packages.

(i) Creating an impression of surveillance of union activities.

(j) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action intended to effectuate the policies of the Act.

(a) On request, bargain with Local Union 553 of the International Brotherhood of Electrical Workers, AFL-CIO-CLC, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment, including acceleration of resignation dates and severance packages, and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time construction and maintenance employees including Apprentice Linemen, Meter Readers, the Lead Meter Reader, Crew Leaders, Servicemen, Warehousemen, part-time Warehousemen, the Garage Coordinator, and

³⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

time Warehousemen, the Garage Coordinator, and Right-of-Way Technicians, employed by Respondent at its Wake Forest, Zebulon, Oxford, Louisburg, and Youngsville, North Carolina facilities, but excluding Member Services Department employees, Engineering Department employees, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Wake Forest, Zebulon, Oxford, Louisburg, and Youngsville, North Carolina, copies of the attached notice marked "Appendix A."³⁶ Copies of the notice on forms provided by the Regional Director for Region 11, after being signed by Respondent's authorized representative, shall be posted by Respondent at its facilities located at Wake Forest, Zebulon, Oxford, Louisburg, and Youngsville, North Carolina, immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 16, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.³⁷

The Union's objections to the election include allegations similar to some of the complaint allegations, and some as to which there is no evidence.³⁸ The meritorious objections are consistent with the foregoing conclusions of law. Accordingly, IT IS FURTHER ORDERED that the election in Case 11-RC-6322 is set aside, and that the petition in that case is dismissed.

Dated at Washington, D.C. February 2, 2000

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

³⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

³⁷ The General Counsel's unopposed motion to correct the record, Appendix B [omitted from publication, all errors have been noted and corrected], is granted.

³⁸ GC Exh. 1(g).

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit and promise to remedy grievances if the employees cause the Union to withdraw a petition for a Board election and otherwise cease supporting the Union.

WE WILL NOT promise employees benefits if they cease their support of the Union.

WE WILL NOT poll our employees to determine whether they will cause the Union to withdraw a petition for a Board election.

WE WILL NOT tell employees that their Union activities will damage their relationships with other electric cooperatives and cause the latter to discontinue helping employees during emergency situations.

WE WILL NOT threaten employees with unspecified reprisals and loss of benefits if the Union wins an election.

WE WILL NOT threaten employees with discharge because of their Union activities.

WE WILL NOT accelerate the resignation dates of employees and grant them severance packages in order to deter them from voting in a Board election and because of their Union activities.

WE WILL NOT refuse to bargain collectively with the Union or unilaterally change our policy on resignation dates or granting severance packages.

WE WILL NOT create an impression of surveillance of Union activities.

WE WILL NOT in any other manner interfere with, coerce, or restrain our employees in the exercise of their rights under Section 7 of the Act.

WE WILL on request bargain with the Union and, if agreement is reached, embody the understanding in a signed agreement.

WAKE ELECTRIC MEMBERSHIP CORP.